United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-2006 B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

To be argued by
Kenneth R. Fields

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SUSAN WAGNER LEISNER, KARIN MALINOWSKI, LINDA GEDEON, CECILIA HUROWITZ, MYROSLAWA WANIO, VICTORIA PRINCIPE, MARGARET KECK MILKMAN and JANE BOOTH, individually and on behalf of all other persons similarly situated,

Plaintiffs,

-against-

NEW YORK TELEPHONE COMPANY,

Defendant.

----------x

Docket No. 74-2006

BRIEF ON BEHALF OF
PETITIONER-APPELLANT
HUROWITZ

Appeal from Order of the United States District Court for the Southern District of New York

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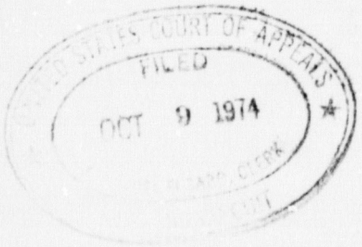

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C 321—Affirmation of Service of Papers by Mail.
Affidavit of Service By Mail on Reverse Side.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Index No. 74-2006

LEISNER et al.,

Plaintiff

against

New York Telephone Company,

Defendant

ATTORNEY'S AFFIRMATION OF SERVICE BY MAIL

STATE OF NEW YORK, COUNTY OF New York *ss.:*

The undersigned, attorney at law of the State of New York affirms: that deponent is Kenneth R. Fields *attorney(s) of record for* Petitioner-Appellant Cecilia Hurowitz

That on October 7, *19*74 *deponent served the annexed* Brief & Appendix *on* Harriet Rabb, Esq. *attorney(s) for* Appellee & Pro Se *in this action at* 435 West 116thh St., New York, N.Y. L))@& *the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in—a post office—official depository under the exclusive care and custody of the United States Postal Service within the State of New York.*

The undersigned affirms the foregoing statement to be true under the penalties of perjury.

Dated Oct. 7, 1974

Kenneth R. Fields

The name signed must be printed beneath

Kenneth R. Fields

Attorney at Law

C 321—Affidavit of Service of Papers by Mail.
Affirmation of Service by Mail on Reverse Side.

Index No.

Plaintiff

against

Defendant

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK, COUNTY OF ss.:

The undersigned being duly sworn, deposes and says:

Deponent is not a party to the action, is over 18 years of age and resides at

That on *19* *deponent served the annexed*

n
ttorney(s) for
n this action at
he address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed n a postpaid properly addressed wrapper, in a post office—official depository under the exclusive care nd custody of the United States Postal Service within the State of New York.

worn to before me

The name signed must be printed beneath

Orig.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

To be argued by
Kenneth R. Fields

SUSAN WAGNER LEISNER, KARIN MALINOWSKI, LINDA GEDEON, CECILIA HUROWITZ, MYROSLAWA WANIO, VICTORIA PRINCIPE, MARGARET KECK MILKMAN and JANE BOOTH, individually and on behalf of all other persons similarly situated,

Plaintiffs,

- against -

Docket No. 74-2006

NEW YORK TELEPHONE COMPANY,

Defendant.

BRIEF ON BEHALF OF
PETITIONER-APPELLANT,
HUROWITZ

Appeal from Order of the United States District Court for the Southern District of New York

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PRELIMINARY STATEMENT

This brief is submitted on behalf of Cecilia Hurowitz, one of the named plaintiffs in the above-entitled action. Ms. Hurowitz was one of eight women employed by the New York Telephone Company in management level positions who brought this class action pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Sec. 2000e et seq. for injunctive relief and damages. The plaintiffs alleged that the Defendant Telephone Company discriminated against women employed in management level positions throughout the State of New York in violation of the statute.

The plaintiffs retained Harriet Rabb, Esq. to prosecute the action. The litigation was concluded with an Agreement of Settlement, dated August 3, 1973, which Agreement was adopted as the judgment of the Court. (Appendix A-16). One of the terms of the Settlement provided in sub-paragraph II(A):

> "Within 10 days following the date this agreement takes effect, the Company shall pay to plaintiffs and their attorneys the sum of $52,100 in the form of a check payable to the order of Harriet Rabb, as attorney." (Appendix A-19, 20).

The named plaintiffs consented to the Agreement of Settlement, relying on their counsel, Attorney Rabb to effect an equitable distribution of the Settlement Fund. Under the terms of the Consent Judgment (Appendix A-16),

the named plaintiffs thereby accepted the Agreement of Settlement in full settlement and compromise of their claims against the Defendant, New York Telephone Company, and the claims of all other members of the plaintiff class, to wit, all women who are qualified for management positions in the Traffic Department of the New York Telephone Company and who are now, have recently been and/or who will in the future be employed by the New York Telephone Company at management level positions in the Traffic Department (Appendix A-6, at paragraph 3), were dismissed without prejudice.

It is the disposition of the aforementioned Settlement Fund that is the heart of the instant action. Appellant Hurowitz was originally allocated $300 of the $52,100 Settlement Fund by her attorney at that time, Harriet Rabb. She thereupon notified Attorney Rabb that she felt that the sum allocated to her was inadequate to reimburse her for the damages she had suffered. Attorney Rabb then corresponded with the other named plaintiffs and consequently raised Ms. Hurowitz' allocation to $600. Ms. Hurowitz, who had lost $6,300 in back pay due to the Defendant-Company's discriminatory practices, still felt that her share of the Settlement Fund was too low, particularly in view of the sums allocated to the other named plaintiffs (Appendix A-61), and in view of the fact that under Attorney Rabb's proposed distribution, the sum of $36,300 (or 69.6% of the $52,100 Settlement Fund) was to be allocated for attorneys' fees.

Attorney Rabb then wrote a letter to the District Court (Appendix A-61), seeking instructions for distribution of the Settlement Fund. This letter was accompanied by an affidavit (Appendix A-62) of Attorney Rabb's, that purportedly informed the Court of the basis of Attorney Rabb's proposed distribution. Also included with the letter was an Order of distribution (Appendix A-73).

At about that time Ms. Hurowitz retained counsel, Wasserman, Chinitz, Geffner and Green, Esqs., to represent her in this matter and to seek a more equitable distribution of the Settlement Fund. Ms. Hurowitz' new counsel submitted a Memorandum on her behalf (Appendiz A-42) and Attorney Rabb thereafter submitted a Reply Memorandum. The Court then signed Attorney Rabb's Order (Appendix A-73) and same was filed on March 15, 1974.

On March 13, 1974, the United States Court of Appeals for the Second Circuit decided the case of City of Detroit v. Grinnell Corporation, Docket No. 73-1211, which mandated evidentiary hearings on fee awards when an aggrieved party requests it. Counsel for Ms. Hurowitz directed the District Court's attention to the decision, and requested an opportunity to be heard in oral argument. The Court agreed to hear the matter on May 17, 1974.

On May 17, 1974 a hearing was held at which time Attorney Rabb submitted another affidavit (Appendix A-74), which was accompanied by an affidavit of her co-counsel, George Cooper (Appendix A-85). At the hearing the Court

decided that it did not have enough information to support the March 15, 1974 Order of distribution and solicited another affidavit from Attorney Rabb to substantiate Ms. Rabb's proposed distribution. (Appendix A-139, at line 23, through A-140, line 19). Attorney Rabb therupon submitted an additional affidavit at the hearing held on May 20,1974. (Appendix A-91).

On June 12, 1974, the District Court handed down a Memorandum Opinion and Order (Appendix A-199) which reinstated the Order of distribution that had been filed on March 15, 1974. Appellant Hurowitz is appealing the aforementioned Order of June 12, 1974, and duly filed her Notice of Appeal on July 16, 1974.

Appellant Hurowitz contends that the District Court erred in signing the Order of distribution, filed on March 15, 1974, in view of the fact that in so doing, the Court distributed the Settlement Fund on the basis of the totally subjective and arbitrary criteria of Attorney Rabb, without regard to the only equitable, objective standard, to wit, the back pay lost by each named plaintiff through the Defendant's discriminatory employment practices, as this was the only monetary measure of damages sought in the Complaint instituting this action to which the creation of the Settlement Fund may be attributed.

Appellant Hurowitz further contends that the District Court erred in its Order and Opinion of June 12, 1974, in finding that only the Settlement Fund, and therefore the

Named plaintiffs, in the instant action, should bear the total liability for counsel fees, and that the class plaintiffs need not pay their proportionate share of legal fees for the benefits bestowed on them through the efforts of counsel.

Appellant Hurowitz further contends that the District Court erred in signing the Order of Distribution, filed on March 15, 1974, in view of the fact that said Order was defective by virtue of the fact that it was not dispositive of the entire Settlement Fund, but merely distributed the sum of $15,799 without mentioning either the size of the Fund ($52,100) or the amount of said fund to be distributed to counsel as legal fees.

Finally, Appellant Hurowitz contends that the District Court erred in not awarding the sum of $2,500 to her counsel for their efforts in effecting an equitable distribution of the Settlement Fund, as precedent for an award of this nature is found in the equitable jurisdiction of the Court as enunciated by the Court of Appeals for the Second Circuit in City of Detroit v. Grinnell Corporation, cited supra at page 3.

ARGUMENT

POINT I

WHEN AN ATTORNEY CREATES OR WILL CREATE A FUND BENEFITTING A CLASS, IT IS EQUITABLE THAT ALL THE CLASS MEMBERS PAY ATTORNEY FEES PROPORTIONATE TO THEIR SHARE OF THE RECOVERY.

In the instant class action, Attorney Rabb negotiated a settlement, under the terms of which, in addition to injunctive relief calculated to alleviate defendant's past practices of sex discrimination, two funds were created. One of these funds, in the amount of $52,100.00 (hereinafter called Settlement Fund) was made payable to the individual plaintiffs (as opposed to class plaintiffs) and Harriet Rabb, as attorney. The second fund (hereinafter designated as Future Fund) includes future benefits to be given to the class plaintiffs in the form of increased salaries due to pay raises and promotions. In her affidavit of May 17, 1974, Attorney Rabb estimated that the size of the Future Fund will be approximately $120,960.00.(Appendix A-80) Because of various factors, she called this a "conservative estimate". It was Attorney Rabb's contention in the Court below that the burden of attorney fees and costs should be borne entirely by the Settlement Fund, and that, therefore, the named plaintiffs in the instant action, should bear the total liability for counsel fees. Under this view, the class plaintiffs need not pay their proportionate share of legal fees for the benefits bestowed on them through the efforts of counsel. The District Court sustained this view in its opinion of June 12, 1974. (Appendix A-199) Appellant Hurowitz contends that this position is not only in-

equitable, but is contrary to the applicable case law, and, therefore, the District Court erred in so holding.

In Lindy Bros. Builders, Inc. of Philadelphia v. American Radiator & Standard Sanitary Corp., D.C. Pa. 1972, 341 F. Supp. 1077, the court held, that where efforts of a claimant and his attorneys have produced a fund to be divided among all members of a particular class, claimant as the representative of the class is authorized to contract for all and to incur proper expenses of litigation, and the property produced by the efforts of such plaintiff and his attorney should bear the burden of the expenses of the attorney's services so that each member of the class who benefits will contribute his due proportion. In Philadelphia Elec. Co. v. Anaconda Am. Brass Co., D.C. Pa. 1969, 47 F.R.D. 557, the court held that class plaintiffs should bear the share of attorney fees proportionate to the amount of their recovery. In City of Detroit v. Grinnel Corporation, D.C.S.D. New York, 1972, 356 F. Supp. 1380, Judge Metzner recognized that the beneficiaries of a settlement of class actions were obliged to pay their share of the cost of litigation which resulted in recovery for them. This view was followed by the Court of Appeals for the Second Circuit in the recent case of Jordan v. Fusari, Docket No. 73-2364, decided April 29, 1974.

In the recent case Hall v. Cole, N.Y. 1973, 93 S.Ct. 1943, 412 U.S. 1, 36 L.Ed.2d 702, the Supreme Court of the United States sustained the United States Court of Appeals for the Second Circuit opinion (462 F.2d 777) holding that the district court had equitable

power to award attorneys' fees on "common benefit" rationale. Mr. Justice Brennan, delivering the opinion of the Court, said (at p. 146):

> "Another established exception involves cases in which the plaintiff's successful litigation confers 'a substantial benefit on the members of an ascertainable class, and where the court's jurisdiction over the subject matter of the suit makes possible an award that will operate to spread the costs proportionately among them.... 'It]o allow the others to obtain full benefit from the plaintiff's efforts without contributing equally to the litigation expenses would be to enrich the others unjustly at the plaintiff's expense.'"

Other United States Supreme Court decisions supporting this view include, Central Railroad & Banking Co. v. Petters, 113 U.S. 116, 5 S.Ct. 387, 28 L.Ed. 915 (1885); Trustees v. Greenough, 105 U.S. 527, 26 L.Ed. 1157 (1882). In Sprague v. Ticonic National Bank, 307 U.S. 161, 59 S.Ct. 777, 83 L.Ed. 1184 (1939) the United States Supreme Court extended the rationale of these cases to authorize an award of attorneys' fees to a successful plaintiff who, although suing on her own behalf rather than as representative of a class, nevertheless established the right of others to recover out of specific assets of the same defendant through the operation of stare decisis. In reaching this result, the Court explained that the beneficiaries of the plaintiff's litigation could be made to contribute to the costs of the suit by an order reimbursing the plaintiff out of the defendant's assets from which the beneficiaries eventually would recover.

Finally, in Mills v. Electric Auto-Lite Co., 396 U.S. 375,

90 S.Ct. 616, 24 L.Ed.2d 593 (1970), the Supreme Court held that the rationale of these cases must logically extend, not only to litigation that confers a monetary benefit on others, but also to litigation "'which corrects or prevents an abuse which would be prejudicial to the rights and interests'" of those others.

Clearly, when viewed in conjunction with the above cases, the District Court's holding that only the named plaintiffs, and not the class plaintiffs, should bear the expense of litigation in the instant case, is in error.

At the May 20, 1974 hearing held in connection with the distribution of the $52,100 Settlement Fund, Attorney Rabb (the Appellee herein) informed the Court that at the time of the negotiations leading to the settlement in the instant case, the $52,100 figure was arrived at with the understanding of the parties that of that sum between $35,000 and $40,000 was to be used for counsel fees. (Appendix A-165 at line 23) In her affidavit of May 17, 1974, she informed the Court (Appendix A-84), "...counsel sought $36,300 which defendant paid without issue." However, the Agreement of Settlement (Appendix A-19 at paragraph IIA) provides, "Within 10 days following the date this agreement takes effect, the Company shall pay to plaintiffs and their attorneys the sum of $52,100 in the form of a check payable to the order of Harriet Rabb, as attorney." No mention is made of the fact that of this Settlement Fund, $36,300 was to be used for attorney fees. In fact, Ms. Rabb's

position is directly at odds with the position followed by the Court of Appeals in Norman v. McKee, D.C.Cal. 1968, 290 F. Supp. 29, affirmed 431 F.2d 769, certiorari denied 91 S.Ct. 879, 401 U.S. 912, 27 L.Ed.2d 811 holding that "Any proposed settlement should be presented in terms of the gross consideration to the Fund or class and the matter of attorneys' fees left for judicial determination and award." In that case the District Court wrote:

> "It will be noted that, although the named plaintiffs in their complaint prayed for a court award of costs including counsel fees, they have now presented a proposed settlement providing that ISI (the defendant) will directly pay a stipulated fee of $250,000 to counsel for named plaintiffs, one half on effective date of the settlement and the remainder within a year thereafter.
>
> "In the opinion of the court this is not a good practice because in some cases it could be a factor making for a premature or inadequate settlement of a derivative or class action..."

This view is substantially incorporated in Court Rule 11B (Fees in Stockholder and Class Actions) applicable in the Southern District, which says in part, "Fees for attorneys or others shall not be paid upon the recovery or compromise in a derivative or class action on behalf of a corporation or class except as allowed by the court after a hearing upon such notice as the court may direct." Although the effective date of the Agreement of Settlement in the instant case was August 3, 1973, Attorney Rabb did not apply to the Court for attorney fees until May 17, 1974.

Furthermore, apparently the named plaintiffs, who were asked to approve the Agreement of Settlement were not informed of the fact that $36,300 of the $52,100 Settlement Fund would go to attorneys' fees. In her affidavit of May 17, 1974, Attorney Rabb wrote, "Counsel undertook to represent plaintiffs and the class of all women similarly situated without any agreement as to fee to be paid by plaintiffs." (Appendix A-77 at paragraph 8). By submitting the Settlement to the named plaintiffs for their approval, without informing them of the arrangement she had worked out with the defendant regarding counsel fees, Attorney Rabb's conduct ran counter to the policy enunciated by the Court of Appeals for the Seventh Circuit in Air Lines Stewards and Stewardesses Association Local 550, et al. v. American Airlines, Inc. et al., C.A. Ill. 1972, 455 F.2d 101. The court held that notice required by Federal Rules of Civil Procedure to be given to members of class before action is dismissed or compromised must fairly apprise members of class of proposed compromise and of options open to dissenting class members in connection with the proceedings. Federal Rules of Civil Procedure, Rule 23(e), 28 U.S.C.A.

In view of the foregoing, the District Court holding that the $52,100 Settlement Fund should bear the entire burden for attorneys' fees and costs is in error.

POINT II

THE DISTRICT COURT ERRED IN DISTRIBUTING THE SETTLEMENT FUND TO THE NAMED PLAINTIFFS ON THE BASIS OF THE SUBJECTIVE AND ARBITRARY CRITERIA OF ATTORNEY RABB, WITHOUT REGARD TO THE ONLY EQUITABLE, OBJECTIVE STANDARD, TO WIT, THE BACK PAY LOST BY EACH NAMED PLAINTIFF THROUGH DEFENDANT'S DISCRIMINATORY EMPLOYMENT PRACTICES.

The Complaint instituting the instant action, in addition to certain injunctive relief, aimed at correcting the Defendant Company's policy of sex discrimination in hiring and promotion practices, also sought monetary damages in the nature of "back pay (for the named Plaintiffs) equal to the difference between the salary paid men with equal qualifications hired at the same time as Plaintiffs and the salary received by Plaintiffs since the beginning of their employment with the Company." (Appendix A-14 at paragraph VIII(D)(i)) Aside from back pay, the only other monetary relief sought was "front pay, prospectively attaching to the salaries of incumbent identifiable victims of discrimination." (Attorney Rabb affidavit of May 20, 1974, Appendix A-96 at paragraph 10). The Appellant Hurowitz is not making any claim to front pay, but is merely seeking her proportionate share of the Settlement Fund for back pay.

In view of the fact that only incumbent named Plaintiffs and Class Plaintiffs will share the front pay, and in view of the

fact that the only other monetary damages sought by the named plaintiffs was for back pay, it is the Appellant's contention that the Settlement Fund reflects an award of back pay and could not have been awarded on any other basis. This view was rejected by the District Court in its opinion of June 12, 1974 where the Court said that the money awarded to the Appellant "...was adequate reimbursement for her participation, risk and visibility in the instant suit". (Appendix A-201, 202). Further, the Court held that "Specific monetary awards under '11.A.' (of the Agreement of Settlement) were not intended as back pay or to remedy any alleged discriminatory past practices, but rather as reimbursement geared to the individual named plaintiff's role as plaintiff." (Opinion of June 12, 1974, Appendix A-203) Appellant contends that this view is error as it rejects the premise that the damages awarded a successful litigant should reflect the relief sought, and is also rejecting the prevailing view enunciated in the following cases.

The courts have uniformly recognized that back pay is a valid measure of damages in a Title VII action. In Arkansas Education Association et al. v. Board of Ed. of the Portland, Arkansas School District, U.S. Court of Appeals for the 8th Circuit, 1971, 446 F.2d 763, the court held that because the school district systematically and without exception paid black teachers substantially less than white teachers, and because this was constitutionally impermissible, all black teachers were entitled to recover the difference between

what they were actually paid and what they would have been paid if all teachers had been treated equally. It is the same theory of damages that led to the creation of the Settlement Fund in the instant action.

In Moody v. Albemarle Paper Company, 474 F.2d 134 (1973), the United States Court of Appeals for the Fourth Circuit, citing Newman v. Piggie Park Enterprises, 390 U.S. 400, 88 S.Ct. 964, 19 L.Ed.2d. 1263 (1968) held:

> "Because of the compensatory nature of a back pay award and the strong congressional policy embodied in Title VII, a district court must exercise its discretion as to back pay in the same manner it must exercise discretion as to attorney fees under Title II (sic) of the Civil Rights Act.... Thus a plaintiff or a complaining class who is successful in obtaining an injunction under Title VII should ordinarily be awarded back pay unless special circumstances would render such an award unjust.... Because there are no such special circumstances here, on remand the district court should include an award of back pay in its order. It is to be remembered, of course, that a back pay award is limited to damages which are actually suffered."

These cases are at odds with the position taken by Attorney Rabb at the May 20, 1974 hearing where she said, "The question is whether anybody got back pay, and, as I have said, no one did, not just Mrs. Hurwitz.(sic) No one did." (Appendix A-160, at line 20) Yet the District Court sustained Attorney Rabb's position in its June 12, 1974 Opinion.

The District Court held (Opinion of June 12, 1974, Appendix A-202, 203) that "...plaintiff Hurowitz' (the Appellant herein) claim that her share of the Settlement Fund should be a function of her length of employment prior to the settlement as compared to the past employment of other named plaintiffs is simply without merit." Appellant Hurowitz contends that in so holding the District Court erred as it thereby rejected the only objective basis upon which the distribution of the Settlement Fund could have been made. The Court went on to say (Appendix A-203) that "As a plaintiff, Hurowitz incurred none of the harassment alleged by other named plaintiffs during the pendency of the litigation." By way of example, the Court cited in a footnote to the Opinion (Appendix A-206) that Plaintiffs Milkman and Principe made complaints of harassment and surveillance on the job to the E.E.O.C. (the Equal Employment Opportunity Commission). Yet the Order of Distribution signed by the District Court Judge (Appendix A-73) shows that neither Plaintiff Milkman nor Plaintiff Principe received the largest shares of the Settlement Fund. In fact, after Plaintiff Hurowitz, Plaintiff Milkman received the smallest share of the Fund ($1,457), while Plaintiffs Leisner and Booth each received $2,957. Yet neither of the latter two made complaints to the E.E.O.C. Furthermore, Plaintiff Leisner left the employ of the Defendant Company prior to the date of the Agreement of Settlement and Plaintiff Booth left the Company within a month of said Agreement.

Apparently, the only basis for Plaintiffs Leisner and Booth's larger share of the Settlement Fund was the fact that the two of them were witnesses at the preliminary injunction hearing and were the only two witnesses called by Plaintiffs in the five day trial. (Attorney Rabb, affidavit of May 20, 1974, Appendix A-94). At the May 20, 1974 hearing, held in connection with the distribution of the Settlement Fund, Attorney Rabb conceded that Plaintiff Hurowitz was "ready, willing and able to help," (Appendix A-161, lines 18-19) yet, Attorney Rabb went on to say that Plaintiff Hurowitz' "...assistance was unavailing." (lines 22-23).

In her affidavit of May 20, 1974 (Appendix A-93), Attorney Rabb wrote (paragraph 6):

> "Incumbent named plaintiffs were actively involved in the pre-trial stages of this litigation and that involvement constituted another factor in making the distribution... Because the data we needed was developed after Ms. Hurowitz quit work, despite her intention to be helpful where possible, there was really no way she could have been of assistance to us in gathering the information."

Here we see Attorney Rabb conceding that Plaintiff Hurowitz remained willing and available to aid in bringing the instant action to a successful conclusion. Yet, she did not call upon Mrs. Hurowitz to participate more actively. In view of the fact that the course of the litigation was under Attorney Rabb's control, Plaintiff Hurowitz should not now be penalized for not being asked to take a more active

role by her former attorney.

In Tippett v. Liggett & Myers Tobacco Co., D.C.N.C. 1970, 316 F.Supp. 292, the Court held that because patterns of conduct sometimes perpetuate effects of prior discrimination, it becomes relevant to consider past practices, policies, and acts of defendants in determining liability under this subchapter. (42 U.S.C. Sec. 2000e-5) The probative value of earlier discriminatory employment practices was also recognized in Buckner v. Goodyear Tire & Rubber Co., D.C. Ala. 1972, 339 F. Supp. 1108, affirmed 476 F.2d 1287 and in Evans v. Local Union 2127, International Brotherhood of Electrical Workers, AFL-CIO, D.C. Ga. 1969, 313 F.Supp. 1354. These cases support the view that if in fact Attorney Rabb wanted Mrs. Hurowitz to participate more actively, her testimony or other aid would have been both relevant and of probative value. Attorney Rabb's contention that Plaintiff Hurowitz "could have been of no assistance" is patently inaccurate, and the District Court erred in sustaining this view in its June 12, 1973 Opinion (Appendix A-199)

It is Appellant Hurowitz' contention that the distribution of the Settlement Fund was completely arbitrary and had no basis in objectivity. For example, in her affidavit of May 20, 1974 Attorney Rabb wrote (Appendix A-92 at paragraph 5), "Another factor considered in the distribution was that once the action was filed, plaintiffs, all of whom except Ms. Hurowitz continued to be employed by the defendant, were exposed to the risk that their employment would be

adversely affected by their plaintiff status." However, when counsel for Plaintiff Hurowitz suggested that his client had also been harassed past filing her E.E.O.C. complaint, that her participation in the instant action may have jeopardized her future employment and/or advancement with the Company and that her participation may have deleterious effects with regard to references should Mrs. Hurowitz seek employment with another company (Appendix A-52), Attorney Rabb dismissed this with, "The speculation about the future effect of Ms. Hurwitz's (sic) not having withdrawn from the suit when she withdrew from the company is impossible to quantify." (Appendix A-71, 72).

Attorney Rabb herself recognized the need for an objective criterion in distributing the Settlement Fund when she wrote in her affidavit of May 20, 1974 (Appendix A-93, paragraph 5), "Furthermore, there is no way of measuring the extent to which participation in this law suit resulted in less than optimal ratings in annual performance and salary reviews of incumbent plaintiffs".

Consonant with the need for an objective standard counsel for Appellant Hurowitz prepared a Proposal (Appendix A-118), which was offered to the District Court at the May 20, 1974 hearing. The transcript of that hearing (Appendix A-168-171) shows a discussion of the Proposal. A more in-depth analysis of the Proposal appeared in the Post-Hearing Memorandum for Plaintiff Hurowitz. (Appendix A-192-197).

In summary, the Proposal first called for apportioning the liability for attorneys' fees to the respective funds created by the attorneys' efforts, namely the Settlement Fund of $52,000 and the Future Fund of $120,960 (supra p. 6). After deducting the proportionate share of the legal fee from the Settlement Fund, we are left with a Net Fund to be distributed equitably among the eight named plaintiffs.

The next step in the Proposal called for a determination of the back pay lost by each of the named plaintiffs prior to August 3, 1973, the effective date of the Agreement of Settlement. Once this determination had been made, the plan called for distribution of the Net Fund to the named plaintiffs in proportion to the back pay lost through defendant's discriminatory employment practices. Counsel for Appellant Hurowitz calculated these sums due to the eight named plaintiffs, and they appear in the last column of the schedule on page 23 of Appellant's Post-Hearing Memorandum (Appendix A-197)

A comparison of the distribution as per the above Proposal with the distribution as per the District Court's order of March 15, 1974 shows that the latter bears no relationship to the equities involved and the relative damages suffered by each of the Named Plaintiffs:

Plaintiff	Distribution as per Court Order	Distribution as per Appellant's Proposal
Leisner	$ 2957.00	$ 3321.93
Booth	2957.00	5055.11
Principe	1957.00	7130.71
Wano	1957.00	5125.20
Gedeon	1957.00	5793.71
Malinowski	1957.00	5793.71
Milkman	1457.00	5125.20
Hurowitz	600.00	3119.68

In view of the foregoing, it is Appellant's contention that the District Court erred in signing the March 15, 1974 Order of Distribution, as said Order was completely arbitrary, and did not effect an equitable distribution.

In her affidavit of February 5, 1974, in attempting to show why Plaintiff Hurowitz' proposed share of the Settlement Fund was so much smaller (originally $300, later raised to $600) than the other named plaintiffs, Attorney Rabb cited the facts that Mrs. Hurowitz was with the Company (defendant) for "only" one year and left the employ of the defendant.(Appendix A-38, paragraph 5) Apparently, Attorney Rabb felt that the length of employment with the Company was one of the criteria to be used in arriving at an equitable distribution. She reiterated this view at the May 17, 1974 hearing, where

she said, "...if length of service is to be an issue, which it clearly was..." (Appendix A-140, at line 7). However, Attorney Rabb did not at that time indicate to the Court that three of the other named plaintiffs had left the Company, nor did she show how long the other named plaintiffs were employed by the Company relative to Plaintiff Hurowitz.

It was not until May 20, 1974 that the Court was informed of the length of employment of all the named plaintiffs in Attorney Rabb's affidavit of same date. (Appendix A-91). That affidavit, incidentally, indicated that Plaintiff Hurowitz was employed for 14 months, and not one year as Attorney Rabb had previously indicated. Also, May 17, 1974 was the first time that the Court was informed that three of the other named plaintiffs, including the two with the largest shares of the Settlement Fund, had also left the employ of the Company. In effect, Attorney Rabb did not present the Court with all the information to which she alone was privy, and which was necessary to effect an equitable distribution of the Settlement Fund, until the Court solicited this information from her on May 17, 1974. Attorney Rabb would have had the Court adjudicate the instant dispute with incomplete and misleading information.

Further, Attorney Rabb's affidavit of May 20, 1974 was misleading in that it presented the Court with data which lended itself to misinterpretation in terms of the underlying theory of damages in the instant case. As mentioned above, (supra p. 12),

the Complaint instituting this instant action in addition to certain injunctive relief, sought monetary damages in the nature of "back pay (for the Named Plaintiffs) equal to the difference between the salary paid men with equal qualifications hired at the same time as Plaintiffs and the salary received by Plaintiffs since the beginning of their employment with the Company." (Appendix A-13 at paragraph VIII(D)(i)). Accordingly, the Length of Service column appearing in paragraph 3 of the aforementioned affidavit (Appendix A-192) should only have reflected the length of service with the Defendant Company prior to August 3, 1973, the effective date of the Agreement of Settlement, as time of employment after that date is referrable only to front pay, and Appellant Hurowitz is not making any claim to front pay. This fact was pointed out to the District Court at the May 20, 1974 hearing (Appendix A-146, lines 7-23), and again in Appellant Hurowitz' Post-Hearing Memorandum. (Appendix A-185-186). Nevertheless, the District Court rejected this distinction in its opinion of June 12, 1974, (Appendix A-202), where the Court said, "Finally, since the Agreement of Settlement made no provision for back pay, but instead focused on future remedial practices, plaintiff Hurowitz' claim that her share of the Settlement Fund should be a function of her length of employment prior to the settlement as compared to the past employment of other named plaintiffs is simply without merit." In Appellant Hurowitz' Post-Hearing Memorandum (Appendix A-186), counsel also questioned the propriety of including

time spent with companies in the Bell System other than New York Telephone in the length of service column in Attorney Rabb's affidavit of May 20, 1974, yet the District Court's opinion completely ignored this question.

Apparently, the District Court disregarded the fact that incumbent Named Plaintiffs (those who remained with the Company after August 3, 1973, the date of the Agreement of Settlement), were to receive considerable benefits in addition to their shares of the Settlement Fund. In Appellant Hurowitz' Post-Hearing Memorandum (Appendix A-187-188), the Court's attention was directed to the fact that in addition to their proportionate share of the Settlement Fund representing back pay lost and front pay which the incumbent named plaintiffs will receive as class benefits, the named plaintiffs who remained with New York Telephone Company (after the effective date of the Agreement of Settlement) have received or will receive additional benefits. Under the terms of the Agreement of Settlement, Plaintiffs Principe and Wanio were promoted (from salary grade 5) to Grade 7 Assistant Dial Service Supervisor positions with commensurate salary increases of at least $2,000 per annum. In addition, they are to receive special supervisory and technical training such as will enable them to be promoted to permanent Grade 10 positions no later than August 1, 1974, if their performance is assessed satisfactorily. Additionally, the Agreement provided that the Company shall use its best efforts

to arrange for Plaintiff Gedeon to be placed in a permanent Grade 7 position (or its equivalent) at the Bell System Company by which she is then employed. Further, the Company shall use its best efforts to have Plaintiffs Gedeon and Malinowski scheduled at an early date for assessment at an Assessment Center, and if assessed satisfactorily the Company shall use its best efforts to arrange for their promotion to permanent Grade 10 positions (or their equivalent) no later than August 1, 1974, and the Company will provide for special training or assistance to facilitate the successful performance of their new job duties.

In view of the foregoing, the Court can readily see that the incumbent Plaintiffs are in fact receiving benefits in addition to back pay. When viewed in this context, Attorney Rabb's statement (in paragraph 10 of her affidavit of May 20, 1974, Appendix A-96), "In sum, any employee who had left the Company, as had Ms. Hurowitz, at the time the decree was entered would not have received either the benefit of the considerable affirmative relief on the salary increments effected," is meaningless and the District Court erred in sustaining this view. Plaintiff Hurowitz is not asking for affirmative relief in terms of training or promotion, or for a salary increment. She is merely asking for her fair share of the back pay awarded.

In its Opinion of June 12, 1974, the District Court said (Appendix A-201), "... the Court is convinced that the $600 which the named plaintiffs collectively decided to award her (Appellant Hurowitz) was adequate reimbursement for her participation, risk, and visibility in the instant suit." The Court attempted to justify the aforementioned contention by citing the fact that "(t)he extent of plaintiff Hurowitz' contribution to this suit was limited to her having filed sex discrimination charges with the Equal Employment Opportunity Commission (E.E.O.C.)." (Appendix A-201). Appellant Hurowitz contends that the lower Court erred in so holding as it applied the wrong standard of damages.

Damages has been defined as the sum of money which the law awards or imposes as pecuniary compensation, recompense, or satisfaction for an injury done or a wrong sustained as a consequence either of a breach of a contractual obligation or a tortious act. Wilson v. Donovan, D.C. La., 218 F. Supp. 944, aff'd T. Smith & Son, Inc. v. Wilson, CA 5,328 F. 2d 313, Restatement, Contracts Sec. 326(a). In the instant case, the plaintiffs sought injunctive relief and damages to redress the deprivation of rights secured to the plaintiffs by Title VII of the Civil Rights Act of 1964 (42 U.S.C. Sec. 2000e, et seq.) The plaintiffs alleged that the Defendant-Company maintained ". . . practices, policies, customs and usages which discriminate against plaintiffs and members of their class because of their sex with respect to hiring and conditions of employment." (Complaint, paragraph 1, Appendix A-5). The statute further provides that an offending respondent (the Defendant Company in the instant case) may be ordered to recompense the plaintiff with back-pay. (42 U.S.C. Sec. 2000e-5 (g)).

Such was the relief sought in VIII (D) (i) of the Complaint in the instant action. (Appendix A-14).

In Moody v. Albermarle Paper Co., C. A., N.C., 1973 (cited supra at page 14), the Court, citing the compensatory nature of a back pay award and the strong Congressional policy embodied in 42 U.S.C. 2000-e, et. seq. said that a plaintiff or a complainting class should ordinarily be awarded back pay unless special circumstances would render such an award unjust. (See also the cases cited supra at pages 13-14). In the instant case, no such special circumstances have been shown. In view of the fact that the Settlement Fund reflects an award of back pay, and could not have been awarded on any other basis, and in view of the fact that Appellant Hurowitz' damages with regard to back pay amounts to the sum of $6,300 (based on paragraph 4 of the Complaint, Appendix A-6, see also Post-Hearing Memorandum for Plaintiff Hurowitz at Appendix A-194 and the Schedule at Appendix A-197), the District Court erred in measuring Appellant Hurowitz' damages as compensation for her "participation, risk and visibility in the instant suit." Appellant Hurowitz sued for back pay lost through the Defendant's discriminatory practices in hiring and promoting, and that is the criterion on which the District Court should have based the distribution of the Settlement Fund.

Appellant Hurowitz further contends that the basis on which the named plaintiffs "collectively decided" (Opinion of June 12, 1974, Appendix A-201, last line) to award her $600 was without merit. In her letter of the named plaintiffs of January 10, 1974 (Appendix A-59), Attorney Rabb indicated that Mrs. Hurowitz was not satisfied with the proposed distribution

of the Settlement Fund. She wrote that Mrs. Hurowitz asked to be given $1,000. In paragraph 8 of Mrs. Hurowitz' affidavit of February 26, 1974 (Appendix A-41), it appears that Attorney Rabb misrepresented Mrs. Hurowitz' position. In her affidavit, Mrs. Hurowitz indicates that she informed Attorney Rabb that she felt she should receive <u>at least</u> $1,000.

Further, in the January 10th letter, Attorney Rabb wrote:

> "In order for me to get your money to you with dispatch, I will, upon receipt of your answers, average the amount you believe Cecilia (Mrs. Hurowitz) is due and deduct an equal 1/7 of that amount from each allocation heretofore agreed on. For example, if you all believe $1,000.00 is correct, I'll deduct $100 from the previous budget for each of you. If some say $1,000, some $300, some $500, etc., I'll add the amounts and divide by 8 (sic?) and deduct 1/7 of the amount over $300 from each of you."

Attorney Rabb apparently felt that the $36,300.00 she arbitrarily awarded for legal fees was sacrosanct. In effect, she was informing the seven other named plaintiffs that the only way they might remedy the initial inequitable proposed distribution was by paying the difference out of their collective pockets. By so doing. she was misleading them to believe that the 69.6% of the fund allocated by her for legal fees was non-negotiable, and apparently not open to discussion. The method proposed in the January 10th letter seems to be at odds with Attorney Rabb's statement that "(c)ounsel has used the means best calculated to fairly canvass all plaintiffs for their views." (Appendix A-63 at paragraph 7). Counsel called the District Court's attention to the method used to "vote" Appellant Hurowitz for her share, (Memorandum for Plaintiff Hurowitz, Appendix A-53-54) but the Court apparently disregarded the improprieties involved.

In the District Court's Memorandum Opinion and Order of June 12,1974, the Court cited the material on which its decision awarding counsel fees and distributing the Settlement Fund was based (Appendix A-200). This material included hearings on May 17, 1974 (transcript, Appendix A-119) and on May 20, 1974 (transcript, Appendix A-142), Memoranda (Appendix A-42, A-68, A-173), and Affidavits (Appendix A-37, A-40, A-74, A-85, A-91). Counsel contends that a thorough reading of the above-cited material will show that the District Court ignored the equities involved and awarded shares of the Settlement Fund, to the named plaintiffs, on the basis of the subjective and totally arbitrary criteria of Attorney Rabb, without regard to the only objective standard, to wit, the back pay lost by each of the named plaintiffs because of the Defendant Company's discriminatory hiring and promotion practices. Counsel contends that the Court relied on the discretion and judgment of Attorney Rabb, and in so doing failed to exercise its own discretion, to the detriment of all of the named plaintiffs.

In the opinion of June 12, 1974, the District Court in deciding that $36,300 was a reasonable sum for counsel fees, said that counsel for Plaintiff Hurowitz had acknowledged that this was a fair rate at the hearing held on May 17, 1974. A thorough reading of the transcript of that hearing (Appendix A-119) shows that counsel for Ms. Hurowitz did not acknowledge that $36,300 of the $52,100 Settlement Fund was a fair rate. However, there was a discussion at the May 20, 1974 hearing at which time the Court asked counsel for Ms. Hurowitz if the hourly rate for counsel fees asked for by Attorney Rabb was appropriate. Consonant with the theory espoused

in the cases cited above (supra, pages 7-9), to the effect that the class plaintiffs should bear the share of attorney fees proportionate to the amount of their recovery, counsel for Ms. Hurowitz said:

> "I think it would be wrong, your Honor, in (sic, "if") the total dollar amount that Miss Rabb seeks comes out of the $52,100 fund, but I am not suggesting that her amount is totally out of line when viewed with regard to the $173,745, and for that reason I believe that the class plaintiffs should bear their share of the counsel fees, and, of course, I am leaving the determination of what a fair amount of counsel fees is for the Court's discretion." (Appendix A-170, at line 24, See also A-171 at line 20.)

The District Court said in its June 12, 1974 Opinion that the value of the Agreement of Settlement is hard to quantify, since the relief is essentially equitable. (Appendix A-201). However, in Attorney Rabb's Affidavit of May 17, 1974, she wrote, "Given 120 promotions, a rough aggregate estimate of monetary benefits accompanying the goals and timetables of the decree equals $120,960. (Emphasis added)(Appendix A-80). When added to the Settlement Fund of $52,100, the total monetary value of the Agreement of Settlement is by Attorney Rabb's estimate $173,745. Thus, the Court erred in failing to find a fund that will be created in the future from which the class plaintiffs proportionate share of the legal fees can be paid.

In Purcell v. Keane, U.S.D.C., Eastern District of Pennsylvania, 1972, 54 F.R.D. 455, the Court said, "...it is settled law that the burden rests with the proponents of the settlement to convince the court that it is fair." In view of the foregoing, Appellant Hurowitz contends that Attorney Rabb has not met this burden, and the District Court erred in finding that she had.

POINT III

THE DISTRICT COURT ERRED IN SIGNING THE ORDER OF DISTRIBUTION IN VIEW OF THE FACT THAT SAID ORDER WAS DEFECTIVE BY VIRTUE OF THE FACT THAT IT DID NOT DISPOSE OF THE ENTIRE SETTLEMENT FUND.

The Order of distribution, filed on March 15, 1974 (Appendix A-73), provided various sums to be awarded to the named plaintiffs in the instant action. Counsel for Appellant Hurowitz has already questioned the equities involved in the distribution. (See Point II, supra, page 12.) The aggregate of the sums so awarded is $15,799. However, the Settlement Fund created under II(A) of the Agreement of Settlement (Appendix A-19) provides that the Defendant Company shall pay to plaintiffs and their attorneys the sum of $52,100. However, the above-mentioned Order of distribution does not mention either the size of the total Settlement Fund or the amount of that Fund to be allocated for counsel fees.

Accordingly, the sum of $36,301 (the difference between the $52,100 Settlement Fund and the net amount distributed) is unaccounted for. Counsel contends that the aforementioned Order was therefore defective by virtue of the fact that it did not dispose of the entire Settlement Fund. Counsel contends that the District Court erred in signing said defective Order.

POINT IV

THE DISTRICT COURT ERRED IN NOT AWARDING COUNSEL FEES TO COUNSEL FOR PETITIONER-APPELLANT HUROWITZ.

At the May 20, 1974 hearing before the District Court, held in connection with the distribution of the Settlement Fund in the instant action, counsel for Appellant Hurowitz proposed a plan of distribution under which the class plaintiffs would pay their fair share of the legal fees for the benefits bestowed upon them. (Appendix A-150, at line 13). Counsel reiterated this proposal in his Post-Hearing Memorandum(Appendix A-192) and provided the District Court with the case law that substantiated the position taken by counsel in the aforementioned Proposal. (Appendix A-177 through A-180). (See also Point I of this brief at page 6.)

Under the terms of the aforementioned Proposal, the sum of $11,634.75, representing the named plaintiffs' proportionate share of the legal fees would be deducted from the $52,100 Settlement Fund. This would result in an additional $24,665.25, to be distributed to the named plaintiffs. This sum represents the difference between the $36,300 they are now paying for legal fees and the lesser amount of $11,634.75 that would be deducted from the Settlement Fund as per counsel's proposal. Counsel for Appellant Hurowitz provided the District Court with an analysis of the time spent on this matter. (Appendix A-193). The total time spent on this matter, (exclusive of time spent in connection with this appeal), was 74 hours. At the May 20, 1974 District Court hearing (Appendix A-152), and again in the Post-Hearing Memorandum for Plaintiff Hurowitz (Appendix A-193) counsel requested the sum of $2500 for his time and efforts in effecting an equitable distribution of the Settlement Fund.

As precedent for an award of this nature, counsel cited the United States Court of Appeals for the Second Circuit opinion in City of Detroit v. Grinnell Corporation, (cited supra, at page 3), which opinion, citing the "historic equity jurisdiction of the federal courts" provided that "...claims (for attorneys' fees) may be filed not only by a party to the litigation but also by an attorney whose actions conferred a benefit upon a given group or class of litigants." Counsel contends that his efforts will result in the creation of an additional fund of $24,665.25 to be distributed to the named plaintiffs. Accordingly, counsel contends that the District Court erred in failing to award attorneys' fee to counsel for Appellant Hurowitz.

CONCLUSION

It is respectfully submitted that the District Court Order of distribution of March 15, 1974 be vacated, and that the Proposal of counsel for Appellant Hurowitz (Appendix A-192 through A-197 be implemented in its stead.

Respectfully submitted,

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TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

42 U.S.C. Sec. 2000e-2

§ 2000e-2. Unlawful employment practices—Employer practices

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

42 U.S.C. Sec. 2000e-5

Injunctions; appropriate affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

RULE 11B

FEES IN STOCKHOLDER AND CLASS ACTIONS

(Applicable in Southern District only)

Fees for attorneys or others shall not be paid upon the recovery or compromiise in a derivative or class action on behalf of a corporation or class except as allowed by the court after a hearing upon such notice as the court may direct. The notice shall include a statement of the names and addresses of the applicants for such fees and the amounts requested respectively. The court, in its discretion, may direct that the notice also be given the New York Regional Office of the Securities and Exchange Commission. Where the court directs notice of a hearing upon a proposed voluntary dismissal or settlement of a derivative or class action, the above information as to the applications shall be included in the notice.

FEDERAL RULES OF CIVIL PROCEDURE

RULE 23(e)

28 U.S.C.

(e) DISMISSAL OR COMPROMISE. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.